

Your Company's Website - Friend or Foe?

By Scott M. Hervey

In today's information age, having a website is almost a prerequisite to doing business. Most companies see their website as a means of communicating with consumers, building relationships and increasing brand loyalty. Most business websites offer more than the basics; they offer industry information, content, data, pictures, downloadable material, games, advertising, electronic commerce and other services. While a website can be a tremendous asset to a company, for the unwary, a website can also expose a company to all sorts of liability.

Every so often it is a good idea to conduct a legal audit of your company's website. An audit can expose potential liability and help identify potentially embarrassing situations before they come to public light. The scope and extent of a website audit depends on the size of the site and its content, however there are basic areas that are always examined.

I. The Site and Its Content

The first place to start in a website audit is an analysis of the content and a determination of ownership. This may prove to be trickier than it initially sounds. A lot of times, a site's content comes from multiple sources, such as licensors and even site users.

Starting with the overall site, it is important to determine whether the creator was an employee or an independent contractor. If the creator is an independent contractor, a review of the agreement employing the website designer is necessary to determine ownership. Because a website is considered a copyrightable work, ownership of the site would be governed by the Copyright Act. Under the Copyright Act, in order to convey ownership of a website from the independent website designer to the company, there must be a written agreement between the parties either stating that the website is "a work made for hire" or providing for an assignment of the website, or both. Without such an agreement, the website designer may maintain ownership of the site and the company's ability to use and modify the website may be extremely limited.

To the extent the site incorporates licensed content, the legal audit will include a review of the license agreements to make sure they are still in force, that all royalty fees have been paid, and that the content is being used in a manner provided for in the license agreement.

Where the site content comes from other sources such as a robots, spiders, or site users, this raises a myriad of issues. If content is derived through robots and spiders trolling other websites, depending on how the content is used, the company may face claims of copyright infringement and trespass. Where the content includes user posts (i.e. chat rooms, bulletin boards, digital files, etc.) this may potentially expose the company to liability for infringement. (Prior to 1996, the website operator might also have been liable for defamation, however, Congress immunized online service providers from such liability when it passed Section 230 of the Communication Decency Act of 1996.)

With respect to potential liability for copyright infringement due to third party content, the Digital Millennium Copyright Act provides limited safe harbors for website operators who unknowingly or inadvertently, transmit, link to, or host infringing material. The Digital Millennium Copyright Act is a complex statutory scheme which requires website owners to adopt certain protocols and procedures governing the removal of infringing content and register an agent for notification of claim of infringement with the copyright office in order to enjoy the benefit of the safe harbors.

After determining ownership and rights, the next important step is to make sure that ownership of the content is properly attributed. If the site contains references to services or products of your

competitors or other third parties, make sure that the display and comments concerning these products or services are fair and accurate. False statements in comparative advertising are one good way to become embroiled in a lawsuit.

II. Use Policies

The next big area in a website audit is a review of the policies which govern use of the site. A website's "Terms of Use" policy defines the relationship between the user and the website operator. It can cover a variety of different areas, including the scope of services offered, user conduct (i.e. agreeing not to post any infringing or defamatory material, interfere or disrupt a service, use the service to violate applicable state and federal laws, stalk or otherwise harass others, etc.) and also identify the site operator's proprietary rights. The Terms of Use policy can also include a disclaimer of warranties and other statements which limit the site operator's liability in certain circumstances.

A Terms of Use policy is more than just fluff and deserves careful attention. Recent cases have acknowledged Terms of Use policies as binding contractual agreement between site operators and users.

The website should also maintain a privacy policy if it collects information from its users. Most of the time, privacy policies are not mandatory, but a voluntary act on the part of the site operator. If a company voluntarily implements a privacy policy, at a very minimum this policy should address the following issues: what type of information is gathered by the site, and what means does the company use to gather this information; how is the user information going to be used by the company; will the company provide the user information to its affiliates; will the company sell the user information to third parties; is there a mechanism for a user to opt out of providing the requested information or otherwise limiting the way in which the information is to be used; and does the site owner have the ability to modify its privacy policy in the future and if so is it required to provide notice to users.

Depending upon the site owner's line of business and the type of information collected, a privacy policy may also have to comport with a number of state and federal laws. California has a number of laws dealing with privacy issues ranging from limiting the number of digits in a credit card that may be displayed in an online transaction to laws governing Spam. The federal government also has a number of laws which would influence a company's privacy policy. One such federal law is the Children's Online Privacy Protection Act ("COPPA") which deals with information collected from children online. With limited exceptions, COPPA requires operators of commercial websites and online services to provide notice and get parents consent before collecting personal information from children under 13.

In addition, the Federal Trade Commission (FTC) takes company privacy policies very seriously. The FTC has taken action against a number of website operators to prevent them from taking action concerning user information that was contrary to the site operator's privacy policy.

III. Linking In And Out

Another important area of the legal audit involves an analysis of sites that link out to and the way in which they are linked to. If the Company links out to a third party site which results in the creation of a new web page, within the user's browser, this is most likely acceptable (as long as your linking does not violate the linking policies of the target site). Trouble arises when the target site is displayed within a frame of the linking site or where the link goes beyond the target's home page and is well within the target site. (This practice is called "deep-linking") Such activity may give rise to liability and certainly can invite the filing of a lawsuit.

In examining the target sites linked to, it is equally important to examine those parties that are linking in to your company's site. Make sure that the link was established in compliance with your company's linking policy. Also, the linking sites should be examined to determine how they link in. If your company's site is framed or otherwise displayed in such a manner to convey some type of an association which does not exist this may be a cause for alarm. Also, be certain that the linking site is one your company would not mind being associated with. Consumers may associate a relationship or assume that your company approves of or otherwise support certain aspects of the linking site. This can prove to be embarrassing if the third party site holds views or engages in a business that is diametrically opposed to the best interest of your consumers.

IV. Conclusion

With the growing number of consumers utilizing the web as the first and only stop in obtaining information about goods or services, creating and establishing a website is an important business aspect. However, there are hidden risks in maintaining and operating a website which can be revealed and dealt with through periodic legal audits.

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